SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 777.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

AUGUST FERGER, THOMAS M. DUGAN, AND ROBERT H. RASCH.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

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1 No. 1199.

In the District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA *vs.* AUGUST FERGER, THOMAS M. DUGAN, and Robert H. Rasch.	Indictment for violation of section 37 of the U. S. Penal Code.

Transcript of record.

Be it remembered that on the thirtieth day of October, A. D. 1917, came the grand jurors for the United States of America, duly empaneled and sworn to inquire within and for the Western Division of the Southern District of Ohio, and presented to the court their certain bill of indictment against the defendants in said cause, which said indictment is clothed in the words and figures following, to wit:

2 In the District Court of the United States of America for the Southern District of Ohio, Western Division. Of the October term in the year nineteen hundred and seventeen.

SOUTHERN DISTRICT OF OHIO,
Western Division, ss:

First Count, section 37, United States Penal Code.—The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Western Division of the Southern Judicial District of Ohio, at the October term thereof in the year nineteen hundred and seventeen, and inquiring for that division and district, upon their oaths and affirmations present:

That August Ferger, Thomas M. Dugan, and Robert H. Rasch, on or about, to wit, the first day of August, in the year nineteen hundred and seventeen, in the city of Cincinnati, in the county of Hamilton, in the State of Ohio, and within the Western Divison of the Southern Judicial District of Ohio and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously confederate, conspire, and agree together, and each with the other, to commit an offense against the United States, to wit, the said August Ferger, Thomas M. Dugan, and Robert H. Rasch did then and there conspire, confederate, and agree as aforesaid, knowingly and with intent to defraud, to falsely make, forge and counterfeit, and aid and assist in falsely making, forging and counterfeiting, bills of lading purporting to represent goods received at Fountaintown in the State of Indiana, for shipment to Cincinnati, in the State of Ohio, and to utter and publish and aid and assist in uttering and publishing such falsely made, forged and counterfeit bills

of lading, knowing the same to be falsely made, forged and counterfeited, and to negotiate and transfer for value said falsely made, forged and counterfeited bills of lading, which said falsely made, forged and counterfeited bills of lading then and there were to contain false representations as to the receipt of goods for shipment as aforesaid.

And that in furtherance of and to effect the object and purpose of said conspiracy, on or about the 21st day of August in the year nineteen hundred and seventeen, in said city of Cincinnati, in said district and division, the said defendants August Ferger, Thomas M. Dugan, and Robert H. Rasch, did negotiate for and secure from the Second National Bank of said city of Cincinnati, a loan of twenty-two thousand dollars ($22,000.00) for the use and benefit of The Ferger Grain Company of Cincinnati, Ohio, and these defendants, which said The Ferger Grain Company was and is a corporation organized under authority of the laws of the State of Ohio, and in which company these defendants were interested as officers, stockholders, and employees, and gave as evidence of said indebtedness a demand note of which the following is a true copy.

$22,000.00 OK Jgg. CINCINNATI, O., *Aug. 21, 1917.*

On demand after date, I, we or either of us, promise to pay Second National Bank or order, twenty-two thousand dollars, ~~or order twenty-two thousand dollars,~~ for value received; payable at SECOND NATIONAL BANK, with interest at 6 per cent per annum, and we hereby pledge as collateral security for the payment of this note and all other obligations now owing the holder hereof, or which may hereafter owe to said holder bills of lading cars of 3 Wh. Corn, 17,321 Bu., 2 $31,177.80.

In case of the market quotations of said collaterals declining, I hereby agree, upon request of the holder hereof to either pledge additional collaterals or reduce the principal of this obligation by payment, so that the quoted market value of said collaterals shall

4 at all times exceed the sum loaned thereon at least ------ per cent, and in default of which agreement, or of payment of this obligation, I hereby authorize and empower the holder hereof, at any time thereafter to sell at my expense, all or any portion of said collaterals, at any place in Cincinnati or elsewhere, at public or private sale, at holder's option, and with or without notice. In case of public sale, the holder hereof may purchase said collaterals or any part thereof, without liability beyond the net proceeds of such sale.

THE FERGER GRAIN CO.,
AUGUST FERGER, *P.*

Copy.

And to further effect the object and purpose of said conspiracy the said defendants, August Ferger, Thomas M. Dugan, and Robert H.

Rasch, negotiated, transferred for value and delivered, and caused to be negotiated, transferred for value and delivered, to said The Second National Bank of the city of Cincinnati, as collateral security for said loan, twelve bills of lading which were then and there falsely made, forged and counterfeited, and which contained false representations as to the receipt of goods, and which said twelve bills of lading were of the standard form of order bill of lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908, all purporting to be issued by the Cincinnati, Hamilton & Dayton Railway Company, and containing the following false statements and information:

Dated at "Fountaintown, Ind.," on the various dates hereinafter set forth, received from "W. D. Springer," "Consigned to order of W. D. Springer," destination Cincinnati, Ohio, notify Ferger Grain Company at Cincinnati, Ohio, route C. H. & D., "Description of contents and special marks corn," weight 80,000 pounds, the name of the agent being stated as "W. E. Shelden" and bearing the endorsements of "W. D. Springer" and "The Ferger Grain Co., Thomas M. Dugan, secretary," said twelve falsely made, forged and counterfeited bills of lading being variously and respectively dated as
5 follows, and containing the following "Car initials" and "Car No.," all of which are set forth herein for further particularity:

"Date."	"Car Initials."	"Car No."
"Aug. 14, 1917"	"N. Y. C."	"11007"
"Aug. 14, 1917"	"C. N. O."	"16904"
"Aug. 14, 1917"	"A. T. S. F."	"21513"
"Aug. 14, 1917"	"Erie"	"86590"
"Aug. 15, 1917"	"C. O."	"4437"
"Aug. 15, 1917"	"Erie"	"104237"
"Aug. 15, 1917"	"N. Y. C."	"97565"
"Aug. 16, 1917"	"N. W."	"28517"
"Aug. 16, 1917"	"B. & O."	"99016"
"Aug. 16, 1917"	"C. O."	"7471"
"Aug. 16, 1917"	"C. C. C."	"43696"
"Aug. 16, 1917"	"Erie"	"109808"

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

STUART R. BOLIN,
United States Attorney for the Southern District of Ohio.

The following endorsement appears on the back of the foregoing indictment: "A true bill, J. R. Clevenger, foreman."

6 And afterwards, to-wit: On October 31st, A. D. 1917, there was filed in the Clerk's office of said court, a certain Præcipe for Capias herein, which said Præcipe is clothed in the words and figures following, to-wit:

Præcipe for capias.

United States District Court, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, *vs.* AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch.	No. 1199. Criminal.

To B. E. DILLEY,
Clerk of said Court:

Please issue capiases in the above entitled cause for August Ferger, Thomas M. Dugan and Robert H. Rasch, defendants in the above entitled cause of action, directed to M. Devanney, United States marshal for the Southern District of Ohio, returnable according to law.

All resident of Cincinnati, Ohio.

STUART R. BOLIN,
U. S. Attorney for Southern Dist. of Ohio.

Capias.

Thereupon there was issued out of the clerk's office and directed to the marshal of said district, a certain writ of capias ad respondendum herein, which said writ is clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division ss:

The President of the United States of America,
7 *To the marshal of the Southern District of Ohio*, greeting:

We command you to take August Ferger, Thomas M. Dugan and Robert H. Rasch if they may be found in your bailiwick, and them safely keep, so that you have their bodies before the judge of the District Court of the United States, within and for the Western Division of the Southern District of Ohio, at the city of Cincinnati in said District forthwith to answer unto the United States of America on an indictment for a violation of Section 37, United States Penal Code presented to said court against them the said August Ferger, Thomas M. Dugan and Robert H. Rasch on the 30th day of October, A. D., 1917, by the grand jury of the United States within and for the Western Division of the Southern District of Ohio.

Hereof fail not, under the penalty of the law, and have then there this writ.

Witness, the Honorable Howard C. Hollister, judge of the District Court of the United States, this 31st day of October, A. D. 1917, and in the 142nd year of the Independence of the United States of America.

Attest:
[SEAL.]

B. E. DILLEY,
Clerk of the United States District Court, S. D. O.
By HARRY F. RABE, *Deputy.*

8 Entry 12-424.

And also on October 31st, 1917, an entry was made on the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA *vs.* AUGUST FERGER, THOMAS M. DUGAN, and Robert H. Basch.	No. 1199.

This day came the district attorney on behalf of the United States, and the defendant, August Ferger, having been arrested on a capias ad respondendum issued upon the præcipe of the district attorney for this district, and having been arraigned at the bar of this court and the indictment herein read to him, for plea says he is not guilty in manner and form as therein and thereby charged, and for his trial puts himself upon the country, and the district attorney doth the like.

It is thereupon ordered by the court that the said defendant, August Ferger enter into a bond in the sum of $2,500.00 with sureties to be approved by the court, judge or clerk, conditioned for his appearance before the court from day to day as the court may direct, and not depart the court without leave thereof.

Thereupon, came the said defendant, August Ferger, and in open court produced E. A. Foy and Wm. Harig as sureties, and upon examination of said sureties as to their qualifications, the court accepted them as sureties on said bond, and in open court, directed the clerk to prepare the bond in the sum named with said E. A. Foy and Wm. Harig as sureties; and it is ordered by the court that said defendant, August Ferger, be released upon executing said bond in the sum named, with said parties as sureties.

Thereupon, came said defendant, August Ferger, and executed said bond and was released from custody.

9 Entry 12–424.

And also on October 31st, 1917, an entry was made on the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA
vs.
AUGUST FERGER, THOMAS M. DUGAN, and Robert H. Basch.
No. 1199.

This day came the district attorney on behalf of the United States, and the defendant, Thomas M. Dugan having been arrested on a capias ad respondendum issued upon the præcipe of the district attorney for this district, and having been arraigned at the bar of this court and the indictment herein read to him, for plea says he is not guilty in manner and form as therein and thereby charged, and for his trial puts himself upon the country, and the district attorney doth the like.

It is thereupon ordered by the court that the said defendant, Thomas M. Dugan, enter into a bond in the sum of $2,500.00 with sureties to be approved by the court, judge or clerk, conditioned for his appearance before the court from day to day as the court may direct, and not depart the court without leave thereof.

Thereupon, came the said defendant, Thomas M. Dugan, and in open court produced E. A. Foy and Wm. Harig as sureties, and upon examination of said sureties as to their qualifications, the court accepted them as sureties on said bond, and, in open court, directed the clerk to prepare the bond in the sum named with said E. A. Foy and Wm. Harig as sureties; and it is ordered by the court that said defendant, Thomas M. Dugan, be released upon executing said bond in the sum named, with said parties as sureties.

Thereupon, came said defendant, Thomas M. Dugan, and executed said bond and was released from custody.

10 Entry 12–424.

And also on October 31st, 1917, an entry was made on the journal of said court in said cause, which said entry is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA
vs.
AUGUST FERGER, THOMAS M. DUGAN, and Robert H. Rasch.
No. 1199.

This day came the district attorney on behalf of the United States, and the defendant, Robert H. Rasch, having been arrested on a

capias ad respondendum issued upon the præcipe of the district attorney for this district, and having been arraigned at the bar of this court and the indictment herein read to him, for plea says he is not guilty in manner and form as therein and thereby charged, and for his trial puts himself upon the country, and the district attorney doth the like.

It is thereupon ordered by the court that the said defendant, Robert H. Rasch, enter into a bond in the sum of $1,000.00 with sureties to be approved by the court, judge, or clerk, conditioned for his appearance before the court from day to day as the court may direct and not depart the court without the leave thereof.

Thereupon came the said defendant, Robert H. Rasch, and in open court produced E. A. Foy and Wm. Harig as sureties, and upon examination of said sureties as to their qualifications the court accepted them as sureties on said bond, and, in open court, directed the clerk to prepare the bond in the sum named with said E. A. Foy and Wm. Harig as sureties; and it is ordered by the court that said defendant, Robert H. Rasch, be released upon executing said bond in the sum named, with said parties as sureties.

Thereupon came said defendant, Robert H. Rasch, and executed said bond and was released from custody.

11 *Recognizance of August Ferger.*

And afterwards, to wit, on October 31st, A. D. 1917, there were filed in the clerk's office of said court certain recognizances herein, which said recognizances are clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Be it remembered that on the 31st day of October, A. D. 1917, before me, B. E. Dilley, clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came August Ferger, as principal, and E. A. Foy and Wm. Harig, as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of twenty-five hundred ($2,500.00) dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the said August Ferger shall personally appear before the District Court of the United States in and for the district aforesaid, at Cincinnati, Ohio, from day to day as the court may direct, and then and there to answer unto an indictment pending therein for violation of section 37 of the United States Penal Code, and then and there abide the further

order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

AUGUST FERGER. [SEAL.]
E. A. FOY. [SEAL.]
WM. HARIG. [SEAL.]

Taken and acknowledged before me on the day and year first above written.

B. E. DILLEY,
Clerk, U. S. District Court, Southern District of Ohio.
12 [SEAL.] By HARRY F. RABE, *Deputy.*

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, E. A. Foy, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth one hundred and twenty-five thousand ($125,000) dollars in real estate in my own name, situate in the county of Hamilton in said district.

E. A. FOY.

Sworn to before me this 31st day of October, 1917.
[SEAL.]
HARRY F. RABE,
Deputy Clerk, U. S. District Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Wm. Harig, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth thirty-five thousand ($35,000.00) dollars in real estate in my own name, situate in the county of Hamilton, in said district.

WM. HARIG.

Sworn to before me the 31st day of October, 1917.
[SEAL.]
HARRY F. RABE,
Deputy Clerk, U. S. District Court, S. D. O.

Recognizance of Thomas M. Dugan.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Be it remembered, that on this 31st day of October, A. D. 1917, before me, B. E. Dilley, clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came Thomas M. Dugan as principal and E. A. Foy and Wm. Harig as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the
13 sum of twenty-five hundred ($2,500.00) dollars to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said Thomas M. Dugan, shall personally appear before the District Court of the United States, in and for the district aforesaid, at Cincinnati, Ohio,

from day to day as the court may direct, and then and there to answer unto an indictment pending therein for violation of section 37 of the U. S. Penal Code, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

THOS. M. DUGAN. [SEAL.]
E. A. FOY. [SEAL.]
WM. HARIG. [SEAL.]

Taken and acknowledged before me on the day and year first above written.

[SEAL.]

B. E. DILLEY,
Clerk, U. S. District Court, Southern District of Ohio,
By HARRY R. RABE, *Deputy.*

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, E. A. Foy, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth one hundred and twenty-five thousand ($125,000) dollars in real estate in my own name, situate in the county of Hamilton in said district.

E. A. FOY.

Sworn to before me the 31st day of October, 1917.

[SEAL.]

HARRY F. RABE,
Deputy Clerk, U. S. District Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

14 I, Wm. Harig, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth thirty-five thousand ($35,000) dollars in real estate in my own name, situate in the county of Hamilton in said district.

WM. HARIG.

Sworn to before me the 31st day of October, 1917.

[SEAL.]

HARRY F. RABE,
Deputy Clerk, U. S. District Court, S. D. O.

Recognizance of Robert H. Rasch.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Be it remembered, that on this 31st day of October, A. D. 1917, before me, B. E. Dilley, clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court personally came Robert H. Rasch as principal and E. A. Foy and Wm. Harig as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of one thousand ($1,000) dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said Robert H. Rasch shall personally appear before the District Court of the United States, in and for the district aforesaid, at Cincinnati, Ohio, from day to day as the court may direct and then and there to answer unto an indictment pending therein for violation of section 37 of the U. S. Penal Code, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

ROBERT H. RASCH. [SEAL.]
E. A. FOY. [SEAL.]
15 WM. HARIG. [SEAL.]

Taken and acknowledged before me on the day and year first above written.

B. E. DILLEY,
Clerk U. S. District Court, Southern District of Ohio.
[SEAL.] By HARRY F. RABE, *Deputy.*

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, E. A. Foy, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth one hundred and twenty-five thousand ($125,000) dollars in real estate in my own name, situate in the county of Hamilton in said district.

E. A. FOY.

Sworn to before me the 31st day of October, 1917.
[SEAL.] HARRY F. RABE,
Deputy Clerk, U. S. District Court, S. D. O.

SOUTHERN DISTRICT OF OHIO, *ss:*

I, Wm. Harig, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth thirty-five thousand ($35,000) dollars in real estate in my own name, situate in the county of Hamilton in said district.

WM. HARIG.

Sworn to before me the 31st day of October, 1917.
[SEAL.] HARRY F. RABE,
Deputy Clerk, U. S. District Court, S. D. O.

And afterwards, to wit, on November 10th, A. D. 1917, came the marshal of said district to whom said writ of capias ad re-
16 spondendum was issued, and returned the same into the clerk's office of said court with his proceedings endorsed thereon, clothed in the words and figures following, to wit:

Return on capias.

Received this writ at Cincinnati, Ohio, on October 31, 1917, and on the same day executed same by taking the bodies of the within named August Ferger, Thomas M. Dugan, and Robert H. Rasch

into custody and have now their bodies before court as within commanded.

The said defendants having been arraigned before court were released upon bond.

M. DEVANNEY,
U. S. Marshal, S. D. O.
By E. R. KENDIG, *Deputy.*
By J. NORRISH, *Deputy.*

3 services	$6.00
3 releases	1.50
	$7.50

17 *Motion to quash indictment.*

And afterwards, to wit, on the 27th day of November, A. D. 1917, came the defendants, by their attorneys, and filed in the office of the clerk of said court, their certain motion to quash the indictment, in said cause, which said motion is clothed in the words and figures following, to wit:

District Court of the United States, Southern District of Ohio, Western Division.

No. 1199.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch, defendants.	Motion of defendants, August Ferger, Thomas M. Dugan, and Robert H. Rasch, to quash the indictment.

Now comes the defendants, August Ferger, Thomas M. Dugan, and Robert H. Rasch, and move the court to quash the indictment returned against them, and each of them, for the reason that said indictment does not state facts sufficient to charge an offense against the laws of the United States of America; that the said indictment is vague, indefinite, and uncertain, and does not advise these defendants and each of them with what he is charged and of the facts claimed to constitute a crime under the laws of the United States, so as to enable them, and each of them, to prepare his defense thereto, and are otherwise insufficient. The particulars of said various defects in said indictment, being as follows, to wit:

Said indictment is indefinite and uncertain, in that—

First. It fails to charge intent to defraud any person or persons.

Second. It fails to state in what manner the said bills of lading were falsely made, forged, and counterfeited.

18 Third. It fails to charge in what manner or how defendants uttered and published said forged and counterfeited bills of lading.

Fourth. It fails to charge how or to whom said defendants intended to negotiate said bills of lading for value.

Fifth. It fails to state the character or kind of false representations intended to be made or that were made as to the receipt of goods or the character or kinds of goods intended to be shipped under said conspiracy.

Sixth. It fails to describe the bills of lading in any particular except that said bills of lading purported to represent goods received at Fountaintown, in the State of Indiana, to be shipped to Cincinnati, in the State of Ohio. It does not describe or give the name of the shipper or the consignee, the character or kind of goods shipped or any manner in which said bills of lading could be identified, or the railroad upon which said goods were shipped.

Seventh. It does not definitely state whether the bills of lading were a forger of and a counterfeit of genuine bills of lading representing real shipments, or whether the bills of lading were wholly fictitious.

JOHN C. HERMANN,
SHERMAN T. MCPHERSON,
Attorneys for Defendants.

19 *Demurrer.*

And afterwards, to wit, on October 14th, A. D. 1918, there was filed in the clerk's office of said court a certain demurrer to the indictment herein, which said demurrer is clothed in the words and figures following, to wit:

District Court of the United States, Southern District of Ohio, Western Division.

No. 1199.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch, defendants.	Demurrer to the indictment.

Now comes the defendants, August Ferger, Thomas M. Dugan, and Robert H. Rasch, and demur to the indictment herein for the reason that the same does not state facts sufficient to charge an offense against the laws of the United States of America, and particularly against the act of Congress entitled, "An act relating to bills of lading in interstate and foreign commerce," approved August 29, 1916, in the following particulars, to wit:

First. That said act of Congress entitled "An act relating to bills of lading in interstate and foreign commerce," approved August 29, 1916, is unconstitutional and void, especially section 41 of said act, in so far as it attempts to make it a crime and punish any person who forges or counterfeits a bill of lading where no shipment from one State to another is made or intended.

Second. That said act can only apply to bills of lading representing actual shipments of merchandise or commerce between the States. If it is intended to apply to wholly fictitious shipments it is unconstitutional and void so far as said fictitious shipments are concerned, because the power of Congress to legislate upon this subject matter is based wholly and solely upon the commercial clause of the Constitution, and if there is no commerce, there is no jurisdiction.

JOHN C. HERMANN,
SHERMAN T. MCPHERSON,
Attorneys for Defendants.

And on the same day there was filed in the office of the clerk of said court a certain opinion on motions to quash and on demurrers, in said cause, which said opinion is clothed in the words and figures following, to wit:

* * * * * * *

Order sustaining demurrer.

And afterwards, to wit, on the 13th day of November, A. D. 1918, an entry was made on the journal of said court in said cause, clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA
vs.
AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch. } No. 1199.

This day this cause came on to be heard upon the demurrer filed by the defendants to the indictment. After being argued by counsel and the court being fully advised in the premises finds said demurrer well taken and sustains the same.

It is further ordered that the indictment be dismissed and the defendants go hence without delay. To all of which the United States, by the United States District Attorney, excepts.

And afterwards, to wit, on the 6th day of December, A. D. 1918, came the United States of America, by Stuart R. Bolin, its attorney in and for the Southern District of Ohio, and filed in the office of the clerk of said court, in said cause, a certain petition for writ of error, in said cause, with said petition for writ or error is clothed in the words and figures following, to wit:

31 In the District Court of the United States, Southern District of Ohio, Western Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch, defendants. } No. 1199. Criminal.

Petition for writ of error.

Now comes the United States of America, plaintiff herein and says that on or about the 13th day of November, 1918, this court entered a judgment herein against the plaintiff and in favor of the defendants, in which judgment and the proceedings had prior thereto and in connection therewith in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will appear more in detail from the assignment of errors which is filed with this petition.

Wherefore, the United States of America, plaintiff herein, prays that a writ of error may issue in its behalf to the Supreme Court of the United States, for the collection of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

STUART R. BOLIN,
United States Attorney for the Southern District of Ohio, Western Division.

32 And on the same day came the United States, by Stuart R. Bolin, its attorney in and for the Southern District of Ohio, and filed in the office of the clerk of said court its certain assignment of errors, in said cause, which said assignment of errors is clothed in the words and figures following, to wit:

33 In the District Court of the United States Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch, defendants. } No. 1199. Criminal.

Assignment of errors.

The plaintiff in this action, with its petition for writ of error, makes the following assignment of errors, which it avers occurred in the decision of the cause, to wit: The learned court erred—

1. In sustaining the demurrer to the indictment on the ground that the statute upon which the indictment is founded (act of August 29, 1916, ch. 415, 39 Stat., 538) is invalid.

2. In sustaining the motion to quash the indictment on the ground that the statute upon which the indictment is founded is invalid.

3. In holding in the decision sustaining the demurrer and the motion to quash that Congress had no power to enact section 41 of the act of August 29, 1916, in so far as it prohibits any person from knowingly or with intent to defraud falsely making, forging, or counterfeiting a bill of lading purporting to represent goods
34 received for shipment among the several States; or with like intent uttering or publishing as true and genuine any such falsely forged or counterfeited bill of lading knowing it to be falsely forged or counterfeited; or with aiding in making, forging, uttering or publishing the same; or with issuing or aiding in issuing or procuring the issue of, or with negotiating or transferring for value such a bill which contains a false statement as to the receipt of the goods or as to any other matter, where there is no actual consignor or consignee, and no actual shipment is made or contemplated.

STUART R. BOLIN,
United States Attorney, Southern District of Ohio, Western Division.

Order allowing writ of error.

And on the same day an entry was made on the journal of said court in said cause, closed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA
vs.
AUGUST FERGER, THOMAS M. DUGAN AND ROBERT H. RASCH. } No. 1199.

This day came the United States attorney for the Southern District of Ohio, on behalf of the plaintiff and presented for allowance a petition for writ of error and an assignment of errors accompanying the same, and upon consideration of the same,

It is hereby ordered that said petition be and the same hereby is allowed, and that a writ of error to the Supreme Court of the United States shall issue.

35 And on the same day came the United States of America, by Stuart R. Bolin, its attorney in and for the Southern District of Ohio, and filed in the office of the clerk of said court a certain præcipe for transcript, in said cause, which said præcipe is clothed in the words and figures following, to wit:

36 In the District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch, defendants.	No. 1199. Criminal.

Præcipe.

To B. E. DILLEY,
Clerk of the United States District Court for the Southern District of Ohio.

Please prepare a certificate and transcript of all pleadings and papers, together with the docket and journal entries in this cause, including a copy of the decision, judgment and opinion of the court herein, to be filed in the Supreme Court of the United States.

STUART R. BOLIN,
United States Attorney, Southern District of Ohio, Western Division.

37 United States District Court, Southern District of Ohio, Western Division.

No. 1199.

THE UNITED STATES OF AMERICA *vs.* AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch.	Violation of section 37 of the U. S. Penal Code.

Docket entries.

Oct. 30, 1917. Indictment filed.
Oct. 31, 1917. Præcipe for capias for defendants Ferger, Dugan & Rasch filed and capias issued.
Oct. 31, 1917. Defendant Ferger arraigned, plea of not guilty entered; bond $2,500.00.
Oct. 31, 1917. Defendant Dugan arraigned, plea of not guilty entered; bond $2,500.00.
Oct. 31, 1917. Defendant Rasch arraigned, plea of not guilty entered; bond $1,000.00.
Oct. 31, 1917. Recognizance of defendant Ferger taken and filed.
Oct. 31, 1917. Recognizance of defendant Dugan taken and filed.
Oct. 31, 1917. Recognizance of defendant Rasch taken and filed.

Nov. 10, 1917. Capias returned and filed endorsed as follows: "Received this writ at Cincinnati, Ohio, on October 31, 1917, and on the same day executed same by taking the bodies of the within named August Ferger, Thomas M. Dugan, and Robert H. Rasch into custody and have now their bodies before court as within commanded. The said defendants having been arraigned before court were released upon bond.

M. DEVANNEY, *U. S. Marshal, S. D. O.*
By E. R. KENDIG, *Deputy.*
By J. NORRISH, *Deputy.*
Fees: $7.50.

Nov. 27, 1917. Motion of defendants to quash the indictment filed.
Mar. 2, 1918. Motion of defendants to quash the indictment argued and submitted.
Oct. 14, 1918. Demurrer to the indictment filed.
Oct. 14, 1918. Opinion of Judge Hollister dismissing indictment filed.
Nov. 13, 1918. Order sustaining demurrer and dismissing indictment.
Dec. 6, 1918. Petition for writ of error filed.
Dec. 6, 1918. Assignment of errors filed.
Dec. 6, 1918. Order allowing writ of error.
Dec. 6, 1918. Writ of error issued.
Dec. 6, 1918. Citation issued.
Dec. 6, 1918. Citation returned and filed, service acknowledged.
Dec. 6, 1918. Præcipe for record filed.

38 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

I, B. E. Dilley, clerk of the District Court of the United States, within and for the district and division aforesaid, do hereby certify that the foregoing is a true, correct and complete transcript of the docket entries, the record and proceedings, and the opinion of the court, in case No. 1199, The United States of America, plaintiff vs. August Ferger, Thomas M. Dugan, and Robert H. Rasch, defendants, as the same appear on file and of record in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court at the city of Cincinnati, Ohio, this seventh day of December, A. D. 1918.

B. E. DILLEY, *Clerk.*
[SEAL.] By HARRY F. RABE, *Deputy.*

39 UNITED STATES OF AMERICA, *ss*:

The President of the United States, to the honorable the judges of the District Court of the United States for the Southern District of Ohio, Western Division, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, or some of you, between The United States of America and August Ferger and Thomas M. Dugan and Robert H. Rasch a manifest error hath happened, to the great damage of the said The United States of America as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the 6th day of December, in the year of our Lord one thousand nine hundred and eighteen.

[SEAL.]

B. E. DILLEY,
Clerk of the District Court of the United States for the Southern District of Ohio.

Allowed by
HOLLISTER,
District Judge of the United States for the Southern District of Ohio.

40 UNITED STATES OF AMERICA, *ss:*

To August Ferger and Thomas M. Dugan and Robert H. Rasch, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 6th day of December, in the year of our Lord one thousand nine hundred and eighteen.

HOLLISTER,
District Judge of the United States for the Southern District of Ohio.

41 (Endorsed:) Service of the within sitation is hereby acknowledged this 6th day of December, A. D. 1918.

JOHN C. HERMANN,
SHERMAN T. MCPHERSON,
Attorneys for August Ferger and Thomas M. Dugan and Robt. H. Rasch, Defendants in Error.

Filed at ------ o'clock ------ m. Dec. 6, 1918. B. E. Dilley, clerk.

42 In the Supreme Court of the United States, October Term, 1918.

THE UNITED STATES OF AMERICA, PLAINTIFF in error, *v.* AUGUST FERGER ET AL., DEFENDANTS IN ERROR. } No. 1199.

Stipulation.

It was agreed on the part of counsel for the Government in the argument in the court below that all of the so-called bills of lading mentioned in the indictment were fictitious, in that there was no actual consignor or consignee, and that they did not relate to any shipment or contemplated shipment whatsoever. The same is agreed upon here, which said agreement is to be treated by this court as a bill of particulars filed to the indictment.

ALEX. C. KING,
Counsel for Plaintiff in Error.
JOHN C. SHERMAN,
SHERMAN T. MCPHERSON,
Counsel for Defendants in Error.

43 (Endorsed:) File No. 26863. Supreme Court U. S. October term, 1918. Term No. 777. The United States, plaintiff in error, vs. August Ferger et al. Stipulation as to facts, etc. Filed Dec. 23, 1918.

44 In the Supreme Court of the United States. October term, 1918.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
AUGUST FERGER ET AL. | No.——.

Stipulation as to printing of the record.

It is hereby stipulated by counsel for the parties to the above-entitled cause that in the printing of the transcript of the record therein, the counts of the indictment after counts Nos. 1 and 2, being in all substantial respects similar thereto, may be omitted.

ALEX. C. KING,
Solicitor General.
JOHN C. HERMANN,
SHERMAN T. MCPHERSON,
Counsel for Defendants in Error.

45 (Endorsed:) File No. 26863. Supreme Court U. S. October term, 1918. Term No. 777. The United States, plaintiff in error, vs. August Ferger et al. Stipulation to omit parts of record in printing. Filed Dec. 23, 1918.

(Endorsement on cover:) File No. 26863. S. Ohio, D. C. U. S. Term No. 777. The United States of America, plaintiff in error, v. August Ferger, Thomas M. Dugan and Robert H. Rasch. Filed December 12th, 1918. File No. 26863.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, Plaintiff in error,
v.
AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch. } No. 776.

THE UNITED STATES OF AMERICA, Plaintiff in error,
v.
AUGUST FERGER, THOMAS M. DUGAN, AND Robert H. Rasch. } No. 777.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, respectfully moves the advancement of the above-entitled cases for hearing during the present term.

Both cases present the single question, whether section 41 of the act relating to bills of lading in interstate and foreign commerce, approved August 29, 1916, 39 Stat. 538, applies to the forging,

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uttering, etc., of bills of lading representing merely fictitious shipments of goods in interstate commerce. The District Court, in sustaining demurrers and motions to quash the indictments, held that the section did not apply to the situation mentioned, and that Congress was without power under the commerce clause of the Constitution to punish such acts.

The question involved is of far-reaching importance to the commercial and financial world and of interest to the public generally.

Notice of this motion has been served on opposing counsel.

ALEX C. KING,
Solicitor General.

MARCH, 1919.

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